No. 94-1072

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In The

Supreme Court of the United States

October Term, 1994

JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAUREEN J. BUSBY, RICHARD H. LILLIE and NICHOLAS HURTGEN,

Petitioners,

v.

MARSHALL BURKES,

Respondent.

On Petition For Writ Of Certiorari
To The Wisconsin Supreme Court

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT J. GINGRAS
GINGRAS LAW OFFICE, S.C.
131 W. Wilson Street
Suite 610
Madison, Wisconsin 53703
(608) 255-0061
Counsel of Record

STEVEN J. SCHOOLER
LAWTON & CATES, S.C.
214 West Mifflin Street
Madison, Wisconsin 53703
(608) 256-9031

Attorneys for Respondent

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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SUPREME COURT RULE 10.1

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

No. 94-1072

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Marshall Burkes ("Burkes") brought this action for damages and reinstatement arising from his termination as executive director for the State of Wisconsin Investment Board ("Investment Board"). (R.2 ¶ 1.) The defendants include various members of the Investment Board, ("Trustees") in their individual and official capacities and M. William Gerrard ("Gerrard"), a lobbyist and real estate broker. (R.2 ¶¶ 5-12.) Burkes alleges he was terminated in retaliation for speaking to the Trustees, the State Attorney General, and Legislative Audit Bureau ("State Auditor")

about the disclosure and amount of finders' fees received by Gerrard, Gerrard's influence among certain Trustees and Gerrard's intimidation of the Investment Board staff. (R.2 ¶¶ 43, 45, 46, 49, 57-61.)

The Investment Board serves as a trustee managing state funds, including over $20 billion in public monies serving 340,000 Wisconsin participants. The funds are mainly pension and retirement funds for public employees. (R.34 ¶ 2.) The Investment Board is governed by an eight-member Board of Trustees. These Trustees have fiduciary obligations toward the management of the assets; they must oversee the investment of assets with the care, skill, and diligence that a prudent person would exhibit acting in a similar capacity with similar resources. (R.34 ¶¶ 2-3.)

Burkes was employed as executive director of the Investment Board from August 20, 1987 until June 23, 1989. As executive director, he was responsible for the management and administration of investments according to the policies adopted by the Board of Trustees. (R.34 ¶¶ 2, 5.)

Burkes' performance through October, 1988 was rated as outstanding. During his entire tenure, Burkes was never formally disciplined, reprimanded, or warned for any weakness or shortcomings in his performance. (R.40 ¶ 7.) Burkes received a $21,000 raise and a $15,000 bonus for his performance in 1987-88. (R.34 ¶¶ 8-9, Exhs. D - H.) Significantly, the Trustees praised his firm treatment of staff. Busby, then chairperson, wrote for the

Investment Board, that he had "shown outstanding ability and willingness to tackle tough issues, such as personnel deficiencies . . . " Busby also wrote,

> In a word, outstanding! You have taken charge and quickly accessed the areas of weakness; addressed deficiencies, particularly in personnel and administration . . .

(R.34, Exh. D.) Busby told Janet Clark, a new employee, in February, 1989, "Marshall Burkes is wonderful, you'll really love working for Marshall Burkes." (R.37 ¶ 5.)

Trustee McMullen wrote:

> Mr. Burkes arrived at SWIB under difficult circumstances. There were personnel issues that had not been adequately addressed, management could be categorized as laissez faire, staff members were functioning independently, and the staff members actually controlled the former Executive Director. . . .
>
> Marshall's performance has been nothing short of outstanding. He has dealt with difficult personnel issues professionally, sensitively, and humanely. His leadership skills have been exemplary – he does not tolerate excuses and demands performance from staff. He is a firm, consistent, excellent manager.

(R.34, Exh. E.) Trustee Gates noted just before Burkes' termination on June 23, 1989 that Burkes was "encouraged to take no backtalk – no mercy approach. . . . " (R.35 Dep. Exh. 65, Bates # 0001540.)

Burkes was first introduced to Gerrard by Hales as a lobbyist and former real estate executive in November of

1987. (R.34 ¶ 11.) Over time, Gerrard's actions and statements raised concerns by Burkes about his influence over the Trustees and staff. These concerns led to the expressions by Burkes before the Trustees, the Attorney General and the State Auditor. (R.34 ¶¶ 46-48, Exhs. A and C.) Gerrard attempted to give Burkes various gifts, including a down coat, football tickets, employment for Burkes' wife and drinks. (R.34 ¶¶ 12, 16, 18-19.) Burkes also learned of close personal relationships between Gerrard and various Trustees, particularly Hales, Klauser and Martin. (R.34 ¶¶ 18-21, 25, and 36.) Hales introduced Gerrard as "his father" on one occasion. (R.36 at Exh. 3, R.35 Zobel Dep. at 122.)

Burkes also learned that Gerrard had a potential to intimidate staff and influence Trustees. Gerrard and Hales both criticized another employee when that employee raised concerns about fees and influence during the pendency of The Company Store refinancing. (R.34 ¶¶ 13, 15, 17.) Gerrard also criticized the former executive director and indicated that Hales should have pushed him out sooner. (R.34 ¶ 15.) The former assistant executive director and current executive director, Pat Lipton, confirmed the legitimacy of these concerns when she told Trustee Gates before Burkes was terminated that staff had been concerned about Gerrard for a long time. (R.35 Dep. Exh. 63, Bates # 0001536.)

Burkes' concerns about Gerrard came to a head in the Spring of 1989 over the investment in The Company Store, the reconsideration of the Santa Clarita project, and the substantial finders' fees Gerrard was earning for merely persuading the Investment Board to fund Lincoln Properties real estate projects. (R.34 ¶¶ 22, 35, 37-43.)

In February 1989, Burkes received a report that The Company Store had suffered a $6 million loss in 1988 and that its line of credit with its bank was drawn above $20 million. Burkes scheduled a meeting with the chief executive officer of The Company Store and Gerrard, inquiring why the Investment Board had not been advised sooner. Burkes reported this meeting to the Trustees. (R.34 ¶ 23, Dep. Exh. 1.) During the course of discussions about The Company Store in March, Gerrard admitted that Klauser had confronted Gerrard about his knowledge of potential problems with The Company Store. Gerrard told Burkes that he was forced to rely on the long-term relationship between himself and Klauser and that Gerrard had never previously lied to Klauser. (R.34 ¶¶ 23, 25.)

At the May Investment Board meeting, a Lincoln Properties real estate project for Santa Clarita was rejected. Gerrard was the loan finder for Lincoln Properties with respect to this project. Following the rejection, Burkes was advised that Martin had been contacted directly by Gerrard and sought reconsideration. (R. 34 ¶ 25.) Martin indicated that Gerrard wanted a special meeting of only certain Trustees that had been critical of the project. (R.34 ¶ 35.) Burkes was very concerned about the manner in which Gerrard contacted the Trustees directly without input of staff, particularly since there was no precedent for reconsideration of a project rejected by the Investment Board. (R.34 ¶ 37.)

During May, Burkes learned that Gerrard was splitting fees with Western Realty and a James Johnson, formerly of Racine, who was apparently a friend of Hales. Burkes learned that the fees to be earned on the Lincoln Properties projects funded and to be funded shortly were

$279,667. (R.34 ¶ 43, Exh. A.) Including Santa Clarita and another project proposed as the South Beach Marina Apartments, the contemplated fees to be earned by Gerrard were $922,167. Burkes was concerned that this was a substantial sum of money for merely serving as a link to the Investment Board. (R.34 ¶ 43.) Also, J. Johnson from Seattle was earning similarly substantial fees. This was again for no management or due diligence review of the project. (R.34 ¶ 38, Exh. A.) Neither the amounts nor the existence of these fees were disclosed to the Investment Board at the time the transactions were approved. *Id.*

Burkes sought to require the disclosure of finders' fees. (R.34 ¶ 38.) While discussing this with Chairperson Martin, Martin indicated that Gerrard had advised that he received fees because "he took staff to lunch and knew how to get deals past Trustees." (R.34 ¶ 35.) Martin had previously commented that he enjoyed meeting with Gerrard and that Gerrard told *him* what was going on at the Board. (R.34 ¶ 36.)

When Burkes advised Hales of the proposed fee disclosure, Hales told Burkes that finders' fees were none of the Investment Board's business. Hales also indicated that he had been contacted by several Trustees complaining that Burkes was vindictive towards Gerrard. Hales further threatened that pursuit of full disclosure would hurt Burkes' future with the Investment Board. (R.34 ¶ 39.)

At the June meeting, the Santa Clarita project was reconsidered and rejected. The disclosure of finders' fees was proposed. Hales vehemently attacked the idea and it died for lack of a second. (R.34 ¶ 40; R.15, Exh. H.) When

the chart disclosing the nature and amount of the fees was presented in executive session, Hales shouted that the Board had already considered those issues. (R.34 ¶ 42.)

Burkes also discussed the matter with Gerrard. Gerrard at first rejected disclosure and reduction, but indicated he would check with the other parties splitting the fees. (R.34 ¶ 44.) Gerrard promised to call Burkes back but never called. *Id.* Shortly after the meeting with Gerrard, Martin asked Burkes in a telephone conversation about the meeting. Yet, Burkes had not previously told Martin about any meeting with Gerrard. Martin did not want to discuss Burkes' concerns about finders' fees but instead stated that Burkes was getting his "tit in a wringer" with Gerrard. (R.34 ¶ 45.) Martin admits making the comment. (R.35 Martin Dep. at 50-51.)

In June 1989, Burkes indicated to the Investment Board that the bank for The Company Store should not be able to escape from its potential loss leaving the Investment Board with its total exposure and that Gillette would not surrender control of the company. Burkes indicated that the strategy was to treat the three major secured lenders, including the bank, as equals, and pressure Gillette to find a new owner. No Trustee indicated that any different strategy should be followed, or criticized the management. (R.34 ¶ 41.)

Burkes was concerned that Gerrard's activities had influenced Trustees with respect to major projects involving large sums of public funds. The Company Store, a Gerrard sponsored investment was in serious financial trouble only months after a major refinancing of over $5

million. Several large Lincoln Properties projects were scheduled to begin funding in July, 1989. (R.34 ¶¶ 43, 46.) Burkes advised Busby, the vice-chairperson, that he was contemplating discussing the finders' fees and influence with the Attorney General. (R.35 Burkes Dep. at 90-96.) Busby admitted in his statement that he was going to the Attorney General was a job performance concern for her. (R.35 Busby Dep. at 54-56.)

On June 19, 1989, Burkes went to the Attorney General and the State Auditor with his concerns. Acting General Counsel for the Investment Board, K. Johnson, accompanied him. Burkes provided a list of questions and the charts previously supplied to the Investment Board detailing the finders' fees for Lincoln Properties. (R.34 ¶¶ 47-48, Exhs. A and C.) Burkes' concerns were the disclosure of finders' fees, the influence of Gerrard upon investment decisions, Gerrard's involvement with The Company Store and its serious financial problems and the fact that several Lincoln Properties projects were scheduled to begin funding in July. (R.34 ¶ 48.) The concerns are reflected in the questions. (R.34 Exh. C.)

Deputy Attorney General Musolf understood that Burkes was concerned and "obviously quite sincere" about finders' fees, their amount and appropriateness, the individuals receiving the fees, and the transactions and influence on the Board. (R.35 Musolf Dep. at 28-30.) Musolf testified that the allegations of influence over investment decisions of public retirement monies was serious, a subject of legitimate inquiry by the Attorney General and that he assigned them to the Division of Criminal Investigation. (R.35 Musolf Dep. at 32-33, 39-40.) Burkes advised Trustee McMullen that he had gone to the

Attorney General because of his concerns about fee disclosure and undue influence. (R.35 Burkes Dep. at 144-48.) Burkes similarly advised Hurtgen that his reasons for speaking to the Attorney General were fee disclosure and influence activity. (R.35 Burkes Dep. at 154.)

Meanwhile, on June 9, the Governor had been sent a letter by facsimile from Dennis McCormick, an employee for a potential purchaser of The Company Store. The letter was apparently provided to Martin who talked to Lipton and then an employee, Francis ("Sandy") Bauch. (R.35 Dep. Exh. 13 at Bates # 004691-94.) On June 12, Martin discussed the letter with Bauch who indicated it was an "unfortunate move" and was concerned that the Investment Board could be reached through the Governor. Martin responded that he would take care of this and that Bauch should keep it confidential. *Id.* (*See also* R.35 Bauch Dep. at 48-49.)

This began a series of secret communications between Bauch, Martin, Lipton and Klauser. Burkes was never advised of their conversations or any criticism concerning The Company Store. (R.34 ¶ 49; R.35 Bauch Dep. at 48-50.)

A meeting to discuss The Company Store was scheduled for June 20, the day Burkes was to leave to attend a seminar in Sausalito, California. Burkes first was advised of the meeting on June 19. (R.34 ¶ 50.) The meeting was scheduled for 5:00 p.m. on Tuesday, June 20. Significantly, at 4:00 p.m. on the same day, June 20, Lipton called a staff meeting and advised that Marshall Burkes had been relieved of his duties. (R.37 ¶ 3.) This was *before* the ostensible meeting to discuss The Company Store where

Klauser appeared with staff comments, and the Board ostensibly voted to relieve Burkes of his duties. (R.15, Exh. I.)

At the June 20 meeting, Bauch presented a chronology of events critical of Burkes. Klauser also appeared with and read negative staff comments made in May. (R.15 Exh. I, R.9 ¶ 15.) Burkes had never previously been advised of the criticisms concerning staff or The Company-Store. (R.34 ¶ 49.) Burkes had never previously been made aware of any criticisms of his performance other than warnings about retaliation if he pursued disclosure of finders' fees. *Id.* In addition, Burkes' speech with the Attorney General about finders' fees was the subject of a "broad range in (sic)" group discussion by the Trustees at the June 20 meeting. (R.35 Zobel Dep. at 50-52.) Significantly, Acting General Counsel K. Johnson, who had been with Burkes to both the Attorney General and the State Auditor, was present for this June 20 meeting when the discussion concerning Burkes' speech to the Attorney General occurred. (R.15 Exh. I.)

In a conversation with Trustee Gates describing the June 20 meeting, Martin indicated that Burkes had been to the Attorney General two weeks ago. (R.35 Dep. Exh. 65, Bates # 0001539; R.35 Dep. Exh. 63, Bates # 0001530; R.35 Gates Dep. at 96-98.) The only other comment about Burkes' performance was the fact that he had been to the Legislative Audit Bureau and The Company Store was discussed. (R.35 Gates Dep. at 96-98.) Lipton advised Gates just before June 23 that one of the issues was finders' fees and confirmed that Burkes had been to the Attorney General concerning fees. (R.35 Dep. Exh. 64, Bates # 0001537; R.35 Gates Dep. at 98.) Trustee Gates

also had a conversation with Burkes. Trustee Gates' notes reflect the following:

> *Marshall*
>
> – Should talk with Paul Saylor for infor. on Gerrard-Hales-Lincoln relationships. SWIB real estate reputation in general.
>
> – Totally oblivious to any issue other than finders fees and real estate deal questions.

(R.35 Dep. Exh. 63, Bates # 0001535, Gates Dep. at 94-95.)

Trustee Gates well understood that Burkes' speech to the Attorney General was a matter of public concern. After his discussion with Chairperson Martin, and possibly after his discussion with Lipton but before the June 23 meeting, Trustee Gates prepared a list of questions which included:

> 6) If finders fees are to become major public issue, how do we handle the issue?

(R.35 Dep. Exh. 65, Bates # 0001539; R.35 Gates Dep. at 87.)

Burkes was advised on June 21 by telephone and on June 22 by telegram that he had been relieved of his duties. No reasons were given. (R.34 ¶ 51; R.15 Exh. J, Bates # 0000835-36.) Burkes was advised by telegram on June 22 that there would be a meeting on June 23 to consider his dismissal. (R.15 Exh. J, Bates # 000835-36.) The only reason given to Burkes, as stated at the June 23 meeting, was to "streamline and improve the efficiency of management at the Investment Board." (R.24 ¶ 54; R.15 Exh. J, Bates # 0000843.)

Although the petition on several occasions states that Burkes never advised the Trustees concerning his speech to the Attorney General and the Legislative Audit Bureau, it is incorrect. The minutes of the meeting taken by and approved by all of the Trustees reflect that Burkes advised the Trustees of his statement to the Attorney General and the Legislative Audit Bureau. The minutes read:

> The Chairman asked Mr. Burkes whether he wanted to say anything.
>
> *Mr. Burkes stated that he feels the Board has an obligation to require full disclosure of finders' fees in SWIB transactions.* He cleared the regular June meeting agenda item on brokers fees with the Chairman prior to the June meeting and made the full extent of finders fees paid in the Lincoln Property Company (LPC) deals known to the Board during the executive session at that meeting.
>
> *Mr. Burkes stressed that he feels that more than $250,000 in fees being paid by LPC to Bill Gerrard in the SWIB transactions is excessive. He questions what Jim Johnson has done to earn his more than $250,000 in fees. He expressed concern about the current financial health of LPC and noted he asked SWIB's outside consultant to check this out.*
>
> *Mr. Burkes then stated he tried to work out an agreement with Bill Gerrard for a reduction of fees. He has been concerned about claims of influence peddling and feels intimidated by Mr. Gerrard.*
>
> *Mr. Burkes closed by noting he asked the Attorney General and the Legislative Audit Bureau for direction in the matter.*

(R. 15, Exh. J, Bates # 0000841, R.Ap. 1-2; emphasis supplied.) The testimony referenced by the Trustees at note 5 on page 11 of their petition actually confirms the above-quoted statement. (R.25 ¶ 75-76, R.Ap. 3-5.)

Rather than expressing surprise over Burkes' discussions with the Attorney General and Legislative Audit Bureau or asking about what Burkes specifically said, the Trustees made repeated statements emphasizing that the termination had nothing to do with finders' fees or issues regarding Gerrard. (R.15 Exh. J, Bates # 0000841-42; R.Ap. at 1-2.)

There were oblique references to problems with Burkes' management by Hales but it is undisputed that no details were provided to Burkes. (*Id.*; R. 34 ¶¶ 51-53.) While the Trustees assert that their displeasure with Burkes' performance had been longstanding, Trustee Hales stated in the meeting, according to the approved minutes,

> Trustee McMullen reiterated that his vote on the motion has nothing to do with the issues regarding Bill Gerrard and disclosure of brokers fees. Trustee Hales agreed, *emphasizing that recently acquired information* on Mr. Burkes' management style led him to his decision on this vote.

(R. 15 Exh. J, Bates # 0000842, emphasis supplied; R.Ap. at 2.) Without further delay, the Trustees voted to terminate Burkes. *Id.* Hales did indicate at the conclusion of the meeting, "I tried to tell you, Marshall." (R.36, A. Burkes Dep. at 105.)

Although denying that Burkes' speech had anything to do with the termination at the June 23 meeting, in

other conversations, the staff and Trustees did indicate that Burkes' pursuit of finders' fees was a basis for his termination. Lipton, who was very involved in the termination and subsequently replaced Burkes as executive director, told Janet Clark that Marshall could have had his job for as long as he wanted but he had to do this thing, referring to Burkes' speech to the Attorney General. (R.37 ¶ 7.) Rev. Woodward, a former Trustee, testified that both Hales and McMullen advised him that Burkes' refusal to let go of the finders' fees issue was a concern involved in Burkes' termination. (R.35 Woodward Dep. at 28-30, 42-44, 223-26.)

Trustees have asserted various reasons unrelated to Burkes' speech as a basis for discharge. Burkes was not advised of these various reasons nor disciplined, reprimanded or counseled concerning any deficiencies in his performance. (R.34 ¶¶ 49-50; R.40 ¶ 7.) Burkes denies the various specific criticisms of his performance with respect to Agri Vest and reprimanding or becoming emotional with Dr. Lillie (R.34 ¶¶ 29-31). Burkes denies misrepresentation concerning Kohlberg, Kravis, & Roberts (KKR). (R.34 ¶ 28.) Burkes denies any inappropriate behavior as to the selection of international managers. (R.34 ¶¶ 32-34.) Burkes also denies various other allegations of unprofessional behavior. (R.34 ¶ 55.)

Indeed, the Trustees' assertion that they had long been concerned about his performance is not only contradicted by the lack of any written evidence of criticism or discipline and by their own evaluations several months earlier, but also by Hales' comment in the minutes that the information as to management problems was

"recently acquired." (R. 15 Exh. J, Bates # 0000841-42; R.Ap. 2-3.)

Thus, much of the asserted bases for dismissal are inconsistent with other statements by staff. Given the outstanding performance evaluations Burkes had received merely eight months earlier in October of 1988, and total lack of expression of the asserted performance concerns before and during Burkes' termination, there is substantial dispute as to the legitimacy and actual existence of these asserted performance problems. (R.34 ¶¶ 8-9, 49-53.)

SUMMARY OF ARGUMENT

Several reasons exist to deny the petition for certiorari before this Court. First, the petitioners have failed to identify or expound upon any of the necessary criteria set forth in Rule 10 of the Supreme Court Rules. This omission alone warrants refusal of the petition.

Second, the Trustees misrepresent the record in claiming that Burkes' speech was unprotected. First amendment retaliation claims against a public employee have been well-established for a decade. *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987). Under these standards, the evidence establishes that the Trustees knew of the content of Burkes' speech before he was terminated. Furthermore, this speech, which dealt with the misuse of public funds, wastefulness and inefficiency, addressed matters of public concern. The form and context of the speech also supports the Wisconsin Supreme Court's ruling that Burkes' speech addressed a matter of public

concern. Moreover, Burkes' speech satisfies the *Pickering* balancing test: the protection of Burkes' First Amendment Rights clearly outweighs the imagined disruptive impact caused by him speaking out. Burkes' high rank with the SWIB is irrelevant to the analysis.

Third, the Trustees cannot claim the protection of qualified immunity. The law has been clearly established that it is unlawful for a public employer to terminate a public employee in retaliation for the employee's protected expression. Thus, where the Trustees caused Burkes' discharge in retaliation for his clearly protected speech, there is no qualified immunity issue.

ARGUMENT: REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED WHERE IT FAILS TO DISCUSS THE CONSIDERATIONS SET FORTH IN RULE 10 OF THIS COURT'S RULES OF PROCEDURE.

Rule 10 of the Supreme Court Rules sets forth the considerations relied upon in determining whether to grant a petition for writ of certiorari. The petition never refers to Rule 10.1 or discusses the standards set forth by Rule 10.1. It is therefore difficult to understand why the Trustees seek review, other than that their disagreement with the decisions of the lower courts.

The Wisconsin Supreme Court decision, as well as the trial court decision which it largely affirmed, was carefully crafted and considered all of the assertions made by the Trustees below. An examination of that

decision, the cases upon which it relied, and its discussion of the cases cited by the Trustees, shows that the Wisconsin Supreme Court followed the law as established by prior decisions of this Court and of other circuit courts of appeals. The absence of direct discussion of the standards established by the Rule may not have been inadvertent. Considerations viewed by this Court to be critical in determining to grant certiorari are not present and, accordingly the petition should be denied.

II. THE TRUSTEES ATTEMPT TO SHOW BURKES' SPEECH WAS UNPROTECTED BY THE FIRST AMENDMENT BY MISREPRESENTATION OF THE RECORD.

The Trustees' discussion of the reasons for granting review is a confusing hodgepodge of factual assertions regarding what they knew about Burkes' speech and the law as to First Amendment retaliation claims and qualified immunity. Once the facts are clearly and correctly set forth, and the fundamental principles of applicable law understood, the Wisconsin Supreme Court's decision is merely the application of established principles to the facts of the case. The need for review by this Court is non-existent.

The requirements for a First Amendment retaliation claim against a public employee have been well-established for a decade. There are four essential elements:

(1) the employee's speech touches upon a matter of public concern;

(2) the employee's First Amendment interests in making the speech outweigh the public employer's interests in the effective fulfillment of its responsibilities;

(3) the protected speech was a "motivating factor" in the detrimental employment decision; and

(4) the detrimental employment decision would not have been made "but for" the protected speech.

Rankin v. McPherson, 483 U.S. 378, 383-84 (1987); *Connick v. Myers*, 461 U.S. 138, 144-54 (1983); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 283-87 (1977); *Pickering v. Board of Education*, 391 U.S. 563, 573-75 (1968).

The first two elements involve a determination of whether the employee's speech is constitutionally protected. *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878, 1884, 128 L.Ed.2d 686 (1994) (plurality op. by O'Connor, J.); *Rankin*, 483 U.S. 384-92. Whether the speech is protected both as to the public concern and *Pickering* balancing are questions of law for the court to decide. *Waters*, 114 S.Ct. at 1884 (plurality op. by O'Connor, J.); *Connick*, 461 U.S. at 148, n.7 and 150, n.10.

The public concern element requires analysis of the employee's speech based upon the content, form and context of speech. *Connick*, 461 U.S. at 147-48. The *Pickering* balancing element requires weighing the employee's First Amendment interest against any injury the speech could cause to the public employer's interests. *Waters*, 114 S.Ct. at 1884 (plurality op. by O'Connor, J.); *Rankin*, 483 U.S. at 388-91. This Court emphasized in *Rankin* that the employer bears the burden of establishing an actual

or threatened disruption caused by the employee's speech. *Rankin*, 483 U.S. at 388-89 (it is not enough for the employer merely to have asserted that the speech did or would cause disruption). *See also Connor v. Reinhard*, 847 F.2d 384, 391 (7th Cir. 1988), *cert. denied*, 488 U.S. 856 (1988).

The third and fourth elements relate to the employer's motivation and whether the speech was the cause of the termination. The employee must establish that the protected speech was a motivating factor, and then the employer has the opportunity to show that the employment decision would have been the same "but for" the protected speech. *Mt. Healthy*, 429 U.S. at 285-87. The third and fourth elements relate to motivation and cause, and thus are not appropriate for qualified immunity. *Waters*, 114 S.Ct. at 1891 (plurality op. by O'Connor, J.); *Gorman v. Robinson*, 977 F.2d 350, 354 (7th Cir. 1992); *Piesco v. City of New York*, 933 F.2d 1149 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 331 (1991).

A. The Trustees Misrepresent The Record As To What They Knew Of Burkes' Speech.

The Trustees assert at page 11, n.5:

> Burkes never told the trustees what he told the two public officials, despite two opportunities to do so: once when he informed them of his visits, and once when he was invited to speak to the trustees before he was discharged. R. 25: 34-35: ¶¶ 75-76.

This is untrue and the source referenced actually states the opposite.

Both the minutes of the June 23 meeting and Burkes' testimony concerning his notes for that meeting establish that Burkes told the Trustees the following: he believed the finders' fees were excessive, he questioned what the various individuals did to earn the fees and was concerned about influence peddling and intimidation by the broker earning those fees, Bill Gerrard. (R. 15, Exh. J, Bates # 0000841, R.Ap. 1-2; R.25 ¶ 75-76, R.Ap. 3-5.) The very next statement by Burkes is that he asked the Attorney General and Legislative Audit Bureau for direction in the matter.

There is no dispute Burkes told various Trustees he went to the Attorney General and the Legislative Audit Bureau and stated his concerns about finders' fees and undue influence; he expressly advised Trustee Gates to examine the "Gerrard-Hales-Lincoln relationships." Hales is the Trustee; Gerrard is the broker or finder who is earning incredible fees from the deals; Lincoln is the seller of the real estate. There is no dispute Burkes provided all of the Trustees with a chart showing the exorbitant fees earned by Gerrard from the Lincoln Property deals. There is no dispute that losses contemplated from The Company Store investment were due to a Gerrard-sponsored deal that went bad. There is no dispute that the native language for each of the Trustees is English.

Based upon these undisputed facts, the Trustees clearly knew that Burkes expressed concerns to the State Attorney General and the Legislative Audit Bureau about excessive finders' fees, disclosure of finders' fees, and Gerrard's influence over the Trustees and intimidation of staff. Moreover, the Trustees had ample opportunity to ask either K. Johnson or Burkes any questions they had

about Burkes' speech. The Trustees either knew or reasonably could have determined exactly what was said.

B. The Wisconsin Supreme Court Properly Held That Burkes' Speech Touched Upon A Matter Of Public Concern Pursuant To Clearly Established Law.

The standard for qualified immunity is whether the law was clearly established such that a reasonable public official would understand that the Burkes' speech touched upon a matter of public concern. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The standard for qualified immunity does not require a previous exact duplication of the case, but case law which closely corresponds to the facts. *Anderson*, 483 U.S. at 640; *Connor*, 847 F.2d at 388; *Roth v. Veteran's Administration*, 856 F.2d 1401, 1408 (9th Cir. 1988); *Auriemma v. Rice*, 910 F.2d 1449, 1456 (7th Cir. 1990) (*en banc*), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2796 (1991). The content, form and context of Burkes' speech shows that it touched upon a matter of public concern as a matter of clearly established law.

The Trustees assert this Court needs to review this case because they did not really understand what concerns Burkes was expressing to the State Attorney General and the Legislative Audit Bureau and because Burkes was expressing these concerns to save his employment or that this was merely an internal policy dispute. With respect to what the Trustees knew, the Trustees have simply misrepresented the record. The undisputed facts establish that the Trustees knew in considerable detail what Burkes expressed to the State officials. In addition,

they had the person who accompanied Burkes to both meetings, the acting general counsel for the Investment Board, at the June 20 meeting when they conducted a broad discussion about Burkes' speech to the State Attorney General. Based upon the *Waters* standard of what the employer knew or reasonably should have known, the Trustees had sufficient information to recognize that Burkes' speech involved the actual and potential misuse of public pension funds and undue influence by Gerrard concerning the investment of those funds.

Content of the speech is the most important factor. *Connick*, 461 U.S. at 147-50 (content of one portion of an employee questionnaire otherwise a personal matter touched upon a matter of public concern). The Wisconsin Supreme Court cited numerous cases which have recognized that the misuse of public funds, wastefulness and inefficiency are matters of public concern. (Appellant's Appendix (A.Ap.) 23-24.) The Wisconsin Supreme Court clearly was correct in recognizing that the content of Burkes' speech was protected pursuant to clearly established law. *Pickering*, 391 U.S. at 575-78 (speech asserting that there were excessive school expenditures for athletics touched upon a matter of public concern.)

The form of Burkes' speech also clearly demonstrates that it involved a matter of public concern. As the learned trial court recognized, "[Burkes] took the subject to the State Auditor whose job it is to audit governmental agencies, and to the Attorney General, the highest law enforcement officer in state government." (A.Ap. 68.) The fact that the conversation was private only serves to underscore Burkes' attempt to minimize the disruption his speech would cause, but it clearly was protected.

Givhan v. Western Line Consolidated School District, 439 U.S. 410, 414-17 (1979). As the Wisconsin Supreme Court recognized, there can be little doubt that the form of the speech warrants protection. (A.Ap. 29; citing numerous cases which have held that speech to the appropriate investigative agencies is protected.)

With respect to context, the Trustees mistakenly assert that motive is the critical factor. The *Connick* Court did not establish motive as a factor, but rather context. Indeed, the *Connick* Court itself held certain speech to touch upon a matter of public concern although arising from the same circumstances as other speech it determined did not touch upon a matter of public concern. *Connick*, 461 U.S. at 148-49. Thus, the focus is not on the speaker's motive *per se*, but whether the expression addresses only its personal effect upon the employee. This is exactly how the *Connick* Court concluded that one question concerning pressures to work in political campaigns did touch upon a matter of public concern. *Connick*, 461 U.S. at 149.

Here, Burkes' expression clearly extended beyond any personal impact on Burkes. Burkes discussed not only the disclosure of finders' fees, but also the amount and excessiveness of those fees and a private party's influence upon investment of public pension fund monies. None of these topics provided any direct benefit to Burkes. Assuming the disclosure issue was a policy dispute between Burkes and the Trustees, it was a matter of *policy* and that policy impacted directly upon Gerrard and his influence, as well as the potential use and investment of public pension funds. The topic and its expression were not related to any personal impact on Burkes,

as was the case for the unprotected speech in *Connick*. The Wisconsin Supreme Court realized as much in rejecting the Trustee's assertions as to the personal motive of Burkes. (A.Ap. 27-28.) The court cited *Connick*, *O'Brien v. Town of Caledonia*, 748 F.2d 403 (7th Cir. 1984) and *Rode v. Dellarciprete*, 845 F.2d 1195, 1201 (3d Cir. 1988).

Contrary to the Trustees' assertions, the Wisconsin Supreme Court considered and rejected the applicability of *Zaky v. Veterans Administration*, 793 F.2d 832 (7th Cir.), *cert. denied*, 479 U.S. 987 (1986) and *Hesse v. Board of Education*, 848 F.2d 748 (7th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989). The Wisconsin Supreme Court considered these cases clearly inapplicable because the expression itself in its context was not focused upon a personal impact on the employee. (A.Ap. at 27-28.) This is also true for the other cases cited by the Trustees at note 4, page 10 of their petition.

The difficulty with the Trustees' insistence upon emphasizing the motive of the speaker is that it makes a factual determination out of a question of law. It is not for a jury to determine whether speech is protected by the First Amendment. To compound matters, the Trustees insist that this factual determination of motive must somehow be incorporated in a qualified immunity analysis as to what a reasonable Trustee would believe was the speaker's motive. As the court held in *Marshall v. Porter County Plan. Comm'n*, 32 F.3d 1215, 1219, "It is often the case that those who speak out are also involved in personal disputes with employers and other employees."

The Trustees' attempt to infuse a standard of what a reasonable employer would think about the motive of the

employee is unsupported by any precedent and totally unworkable. Both *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534 (1991) (*per curiam*) and *Anderson* addressed whether facts known by officers satisfied a probable cause standard. That is a far cry from speculating about the motives of a public employee in speaking and adding to that speculation, the standard of what a reasonable public official would have speculated about the motive. In most instances, an employer will be able to assert some sort of a personal motive by the employee and then claim qualified immunity. The protection of the First Amendment for public employees would be lost.

For example, the Trustees assert that Burkes' motive was to protect his job, although his speech, itself, had nothing to do with protecting his job. Burkes' performance evaluations eight months previously were outstanding. Burkes was never reprimanded or formally disciplined in any way before his termination. The only direct statements by Trustees concerning Burkes' continued employment were threats of retaliation by Trustees Hales and Martin in reaction to Burkes' concerns about finders' fees and Gerrard. The Trustees went to great lengths to keep from Burkes comments by employees he supervised and concerns about his handling of The Company Store. If this were not enough, one of the Trustees concluded after talking to Burkes just before the meeting on June 23, "Totally oblivious to any issue other than finders fees + real estate deal questions." (R.35 Dep. Exh. 63, Bates # 0001535.) Also, Trustee Hales admitted at the June 23 meeting that the information leading him to his decision to terminate was "recently acquired."

The Wisconsin Supreme Court correctly analyzed the content, form and context of the speech. Consideration of all three leads to the conclusion, consistent with clearly established law, that Burkes' speech touched upon a matter of public concern. The Trustees' attempt to incorporate factual matters about motive and reasonable speculation about motive are unsupported by any authority and are wholly unworkable. Accordingly, there is no reason to grant the petition to create a whole new doctrine of qualified immunity.

C. The Wisconsin Supreme Court Properly Held That Burkes' Speech Satisfied the *Pickering* Balancing as a Matter of Clearly Established Law.

Pickering requires balancing of the employee's First Amendment interest against any injury the speech could cause to the public employer's interests. *Waters*, 114 S.Ct. at 1884 (plurality op. by O'Connor, J.); *Rankin*, 483 U.S. at 388-91. The Trustees have no evidence of disruption or potential disruption caused by Burkes' private expressions of concern to the State Attorney General and the Legislative Audit Bureau. Moreover, it is undisputed that Burkes attempted to resolve these issues first with the Trustees and later with Gerrard before expressing any concerns, further minimizing the potential for any disruption.

Trustees' sole argument as to disruptive impact, citing *Rankin*, is that Burkes' position alone was sufficient to outweigh his First Amendment interests. The Trustees did not rely upon this as a basis for termination either;

regardless, a high-ranking position, without more, cannot establish disruption or potential disruption. If that were so, all high-ranking employees have absolutely no First Amendment protection as a matter of law. Again, Trustees cite no authority that rank, without more, automatically establishes disruption or the threat of disruption.

The main thrust of the Trustees' argument is that they should have been able to consider Burkes' job performance in the context of the *Pickering* balancing. Considering the cases cited by the Trustees, including the *Hesse* case which was distinguished earlier in its opinion (A.Ap. 25-26), the Supreme Court recognized that these cases involved repeated disruptive speech which were the employee's performance problem. (A.Ap. 35.) Here, unlike the cases cited by the Trustees, Burkes' speech was not considered by the Trustees to be a job performance problem. It is difficult to imagine how Burkes' speech to the Attorney General and the Legislative Audit Bureau about concerns over disclosure of finders' fees, excessiveness of finders' fees and the influence of Gerrard over investment decisions could be a job performance problem.

What the Trustees really seek, again without any authority, is to import the *Mt. Healthy* "but for" test into the *Pickering* balancing test. The courts where this has been asserted have uniformly rejected it as inappropriate. *Gorman*, 977 F.2d at 355; *Piesco*, 933 F.2d at 1155. The Trustees' position would eliminate the *Mt. Healthy* "but for" requirement because in every instance the employer would assert job performance concerns as part of the *Pickering* balancing. The employer would then assert

qualified immunity to cloak all employment decisions. The case where an employee could show, as a matter of "clearly established law" that various job performance concerns, however concocted, by an employer were insufficient to warrant discipline as a matter of clearly established law would be non-existent.

The Wisconsin Supreme Court properly rejected the Trustees' attempt to import the *Mt. Healthy* "but for" test into the *Pickering* balancing test. There is clearly no split among the circuits or state courts of last resort on this issue and no reason for this Court to consider this assertion by the Trustees.

III. THE TRUSTEES ARE NOT ENTITLED TO QUALIFIED IMMUNITY ON WHETHER THEY WERE MOTIVATED TO TERMINATE BURKES BECAUSE OF HIS SPEECH.

The issues concerning the third and fourth elements of a First Amendment retaliation claim, motive and cause, are not issues of law, but rather issues of fact. The law has been clearly established since 1968 that it is a violation of the First Amendment for a public employer to cause the termination of a public employee in retaliation for the employee's protected expression. *Pickering*, 391 U.S. at 573-75. Thus, where the Trustees caused Burkes' discharge in retaliation for speech which was clearly protected, there is no qualified immunity issue. The Trustees point to no decision which holds otherwise. In fact, the courts of appeals have been unanimous in rejecting such assertions. *See Gorman*, 977 F.2d at 355; *Piesco*, 953 F.2d at

1155; *Peacock v. Duval*, 694 F.2d 644, 646 (9th Cir. 1982); *Mabey v. Reagan*, 537 F.2d 1036, 1045 (9th Cir. 1976).

This Court's holding in *Waters* was consistent with the earlier decisions of the courts of appeals. In *Waters*, this Court held it could not decide as a matter of law, as a matter of qualified immunity, which speech the employer relied upon in terminating the employee. *Waters*, 114 S.Ct. at 1891 (plurality op., O'Connor, J.) and 1893 (Souter, J., concurring). Where there was a factual issue was to motive and as to whether the employee would have been terminated regardless of the protected speech, the resolution of that issue was for the factfinder. *Id.*

Here, there is substantial evidence establishing that the Trustees terminated Burkes for his speech to the Attorney General and the Legislative Audit Bureau. There is substantial evidence that Burkes' asserted performance problems were concocted as an excuse for the retaliation. Perhaps the best example was the Trustees' asserted reliance upon the complaints of some, but not by any means all, staff members. The Trustees encouraged Burkes to be tough with the staff members and praised him in his previous evaluations for that conduct. After Burkes speaks to the Attorney General and the Legislative Audit Bureau, the Trustees then fire Burkes for being tough on staff?!

The Wisconsin Supreme Court correctly applied the law. The courts of appeals and this Court have concluded that qualified immunity has no application in decisions concerning motive or cause, because these are not legal

standards. The attempt to impose a requirement of qualified immunity onto such requirements would be incredible and allow employers to defend by concocting job performance problems in every case totally eliminating the protection of the First Amendment for public employees. Thus, the petition should be denied.

CONCLUSION

The considerations which warrant review by this Court are not present where the decision of the Wisconsin Supreme Court followed the decisions of this Court consistent with decisions in similar cases by the circuit courts of appeals. Accordingly, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT J. GINGRAS
GINGRAS LAW OFFICE, S.C.
131 W. Wilson Street
Suite 610
Madison, Wisconsin 53703
(608) 255-0061
Counsel of Record

STEVEN J. SCHOOLER
LAWTON & CATES, S.C.
214 West Mifflin Street
Madison, Wisconsin 53703
(608) 256-9031

Attorneys for Respondent

January 16, 1995

APPENDIX

STATE OF WISCONSIN INVESTMENT BOARD
Friday, June 23, 1989
Minutes of the Special Meeting
The Milwaukee Athletic Club
785 North Broadway
Milwaukee, Wisconsin
(continued)

II. Closed Session

The Chairman asked Mr. Burkes whether he wanted to say anything.

Mr. Burkes stated that he feels the Board has an obligation to require full disclosure of finders' fees in SWIB transactions. He cleared the regular June meeting agenda item on brokers fees with the Chairman prior to the June meeting and made the full extent of finders fees paid in the Lincoln Property Company (LPC) deals known to the Board during the executive session at that meeting.

Mr. Burkes stressed that he feels that more than $250,000 in fees being paid by LPC to Bill Gerrard in the SWIB transactions is excessive. He questions what Jim Johnson has done to earn his more than $250,000 in fees. He expressed concern about the current financial health of LPC and noted he asked SWIB's outside consultant to check this out.

Mr. Burkes then stated he tried to work out an agreement with Bill Gerrard for a reduction of fees. He has been concerned about claims of influence peddling and feels intimidated by Mr. Gerrard.

Mr. Burkes closed by noting he asked the Attorney General and the Legislative Audit Bureau for direction in the matter.

Trustee McMullen emphasized that no one is trying to hide anything. He asked why the supposed financial difficulties of LPC had not been addressed previously – during the due diligence period. Mr. Burkes asserted that the issue had been discussed previously.

Trustee Gates stated he is satisfied that the finders' fees issue is not a factor in the action the Board is now considering. Mr. Burkes commented that he is being honest about his feelings. He has tried to work things out with Mr. Gerrard and feels intimidated.

Mr. Burkes then noted there are no real estate professionals on the Board and stated he feels the Board is vulnerable with real estate. Although this is the smallest investment division, the Board has been more involved in real estate than any other area. He also sees the Wisconsin Private Placements program as an area of vulnerability.

In response to a question from Trustee Lillie about status of the LPC deals, Mr. Burkes explained the Board has approved four LPC joint ventures, and a San Francisco apartment building proposal is now being discussed. The approved deals total $40-50 million, but three have not yet been funded.

Trustee Klauser asked Mr. Burkes whether he had approved the LPC deals brought to the Board. Mr. Burkes acknowledged that he had, but stated payment of fees was subject to due diligence.

Trustee Busby emphasized her agreement with statements by other Trustees that the brokers' fees issue has nothing to do with the question before the Board.

Trustee Busby moved to dismiss Marshall Burkes from his position as Executive Director of the State of Wisconsin Investment Board, effective immediately.

Trustee McMullen again stated that it should be made clear that this action is not being taken because of the fees issue. The Chairman explained that the action of the Board is being taken to streamline and improve the efficiency of management at the Board. Trustee Hales noted that the Board has become aware of problems with Mr. Burkes' management at the Board.

Trustee McMullen seconded the motion to dismiss.

Trustee Hales inquired about severance pay. Mr. Burkes responded that, as a matter of principal, he does not feel it is appropriate to bargain for a letter of resignation.

The Chairman asked Mr. Burkes to clarify whether he wants to bargain over an arrangement for his resignation. Mr. Burkes stated that he does not want to bargain.

Trustee McMullen reiterated that his vote on the motion has nothing to do with the issues regarding Bill Gerrard and disclosure of brokers fees. Trustee Hales agreed, emphasizing that recently acquired information on Mr. Burkes' management style led him to his decision on this vote. He sees the action being taken by the Board as crucial to improved management of the Board.

The Chairman directed that the roll be called:

Mr. Martin	– Aye	Ms. Busby	– Aye
Mr. Hales	– Aye	Mr. Klauser	– Aye
Mr. Lillie	– Aye	Mr. McMullen	– Aye
Mr. Hahner	– Aye	Mr. Gates	– Aye

There being 8 Ayes and 0 Nays, the Chairman declared the motion to dismiss the Executive Director passed.

The Chairman stressed that this action is being taken by the Board to streamline and improve the efficiency of management at the Investment Board.

There being no further business, it was moved by Trustee Hahner and seconded by Trustee Klauser to adjourn the meeting.

The Chairman directed that the role be called:

Mr. Martin	– Aye	Ms. Busby	– Aye
Mr. Hales	– Aye	Mr. Klauser	– Aye
Mr. Lillie	– Aye	Mr. McMullen	– Aye
Mr. Hahner	– Aye	Mr. Gates	– Aye

There being 8 Ayes and 0 Nays, the Chairman declared the meeting to be adjourned at 2:30 P.M.

Respectfully submitted:

/s/ Gary I. Gates
Gary I. Gates, Secretary

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 3 | DANE COUNTY

MARSHALL BURKES,

Plaintiff,

vs.

JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAURENN J. BUSBY, RICHARD H. LILLIE, NICHOLAS HURTGEN,

Defendants,

M. WILLIAM GERRARD,

Defendant-Third-Party Plaintiff,

ACCELERATION NATIONAL INSURANCE COMPANY and RURAL MUTUAL INSURANCE COMPANY,

Third-Party Defendants.

Case No. 89-CV-4227
R. 25, pp. 75-76

AFFIDAVIT OF BRUCE A. OLSEN

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

BRUCE A. OLSEN, being first duly sworn, on oath deposes and says:

75. In his April 24, 1992 deposition, Burkes was asked the following questions and gave the following answers:

Q Were you called back in California during the week of June 19?
A Yes.
Q And you were called back to what location?
A A meeting place in Milwaukee.
Q Can you remember what the meeting place was?
A A private club that Maureen Busby belongs to, which I believe is the athletic club.
Q How did you get to Milwaukee?
A Flew in by way of Chicago on the red-eye special.
Q On what day?
A That morning.
Q The morning of the 23rd?
A Yes.

Burkes deposition, page 160.

In his April 24, 1992, deposition, Burkes was asked the following questions and gave the following answers:

Q When did you arrive at the Milwaukee Athletic Club?
A About 30 minutes before the appointed meeting time.
Q What did you do before the meeting began?

15 A Called an attorney who I had communicated with the
16 previous day.
17 Q And who was that?
18 A Mr. Gingras.
Burkes deposition, page 161.

76. In his April 24, 1992, deposition, Burkes was asked the following questions and gave the following answers:

11 Q Tell me everything you said at the meeting.
12 A I think I have forwarded the notes on that meeting.
13 (Exhibit 32 is marked for identification)
14 Q Show you what's been marked as Exhibit 32, Mr. Burkes,
15 and ask you whether you can identify this.
16 A Yes.
17 Q What is it?
18 A These are my scribblings that I did either just before
19 or during the meeting before giving a statement.
20 Q Is this the statement that you made to the trustees?
21 A These are the notes which I used as background notes,
22 and in this case I because of the nature of the meeting
23 probably made more direct referral than I normally
24 would with background notes.
25 Q What does that mean?
1 A That means that I probably had these closer at hand and

not necessarily in my black notebook and would have made more direct reference to these notes.

Q Do you mean that you would have followed these notes carefully in your remarks?

A Yes.

Q I wonder if you might help me out and read all the notations on this paper.

A "Text of Statement, 6-23-89."

Q Up at the very top right-hand corner there is –

A I'm thinking about the open meeting which we've just discussed.

MR. AXELROD: Read it.

Q Read it, please.

A "Open meeting request," and I can't see what the next word is.

Q Over on the right-hand side?

A On the right-hand side is "By Marshall Burkes, Executive Director."

Q "Text of Statement, 6-23-89." Next notation is?

A "Chris George of Save the Children has disappeared into Gaza yesterday, a true American Professional and former associate."

Q Next notation?

A "1. Full disclosure is our fiduciary obligation, and I

cleared that agenda item with Chairman Martin."

Q Next?

A "Once I knew of the fee splitting, no written representation and the magnitude of the so-called 'Finders Fee,' I felt each trustee should know in executive session."

Q Next notation?

A "Over one quarter million dollars to Bill Gerrard is excessive, and I do not know what" –

MS. ARTS: Did you skip a word, Mr. Burkes, in that next line after the word "I"?

A "I still do not know what Jim Johnson of Seattle did to earn over a quarter of a million dollars. Lincoln Property Company in California may be in desparate financial health. I have requested a current report from Paul Saylor of Institutional Property Consultants in Atlanta."

Q And the next notation?

A "I tried in good faith to work out an agreement with Bill Gerrard last week for now and for future relations. He did not," not is underlined, "get back to me as promised, after talking to several trustees."

Q The next notation?
A "With this 'influence peddling and intimidation,' I felt it prudent to ask the auditor general and attorney generals' offices for advice and clearance of the pending transactions."
Q The next notation?
A "I trust that you, the trustees, will not retaliate against me."
Q Next notations?
A Something about visit with Woodward. "Tom would keep the proper perspective if he was still here. Ann says that miscommunication can be corrected."
Q Next notation?
A "What are your specific reasons?"
Q And the next notation?
A "No on resignation."
Q You would have stuck pretty closely to this text in your statement to the board?
A Yes.
Q Is there any part of this statement that you did not tell the board about?
A Not that I recall.

Burkes deposition, pages 165-68.